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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1933

## No. 347

STANDARD OIL COMPANY OF CALIFORNIA,
*Appellant,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Respondent.*

**Appeal from the Supreme Court of the State of California.**

## BRIEF FOR APPELLANT.

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THE PEOPLE OF THE STATE OF CALIFORNIA,
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**Appeal from the Supreme Court of the State of California.**

## BRIEF FOR APPELLANT.

### OPINIONS BELOW.

The opinion of the Supreme Court of California (R. p. 68) is reported in 85 Cal. Dec. 559,* 22 P. (2d) 2. The opinion of the Superior Court of the State of California (R. p. 59) is unreported.

*The reference is to "California Decisions," the unofficial advance publication of the opinions of the Supreme Court of California. The case has not yet appeared in the official reports.

## JURISDICTION.

The required statement as to jurisdiction in support of the appeal has been filed. Probable jurisdiction was noted on October 9, 1933.

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## QUESTION PRESENTED.

The Presidio at San Francisco is a United States Military Reservation. Exclusive jurisdiction over it has been ceded to the federal government by the State of California. This case involves the question whether the state, after such cession, has power to impose its gasoline tax in the case of sales made in the Presidio to the Army Post Exchange.

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## STATUTES INVOLVED.

The taxing statute involved is The California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, p. 571, chap. 267, as amended by Cal. Stats. 1925, p. 659, Stats. 1927, pp. 1308, 1565). The basic provision is in Section 3:

> "Every distributor shall from and after September 30, 1923, in addition to any other taxes provided by law, pay a license tax to the state controller of this state of two cents for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor *in this state* and *sold and delivered by him in this state,* or imported by such distributor into and distributed or *sold by him in this state* otherwise than in the original package or container in which such motor vehicle fuel was imported into this state, and for each gallon of motor vehicle

fuel imported into this state and thereafter acquired by such distributor in the original package . . ."*

The final act of cession of the Presidio by California to the United States is the act of 1897 (Cal. Stats. 1897, p. 51):

"Section 1. The state of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this state now held, occupied, or reserved by the government of the United States for miliary purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; Provided, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated; and provided further, that this state reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this state against any person or persons charged with crimes committed without said lands. . . ."

It is stipulated that the description and map required by the act of cession was duly filed (R. p. 6).

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## STATEMENT.

This cause was tried upon an agreed statement of facts which may be summarized briefly. During the course of the year 1929, appellant sold and delivered a quantity of gasoline to the United States Army Post Exchange located on the Presidio military reservation at

*Other sections of the act deemed relevant are reproduced in the Appendix, pp. i-iv, *infra*.

San Francisco. The State of California seeks to impose the state gasoline tax on this sale. In the stipulation of facts it is recited that the gasoline was "sold and delivered to the Presidio Post Exchange at the Presidio" (R. p. 4); that it "was carried by the defendant in barrels and by tank trucks to the Presidio Post Exchange; and in making delivery the defendant (appellant) bore the expense and risk of loss" (R. p. 5); and that "the place of sale and delivery of said gasoline was and ever since (March 2, 1897) has been held, occupied and reserved by the Government of the United States for military purposes and defense" (R. p. 5). The place where the sale was consummated and title passed is thus established as being within the Presidio.

Under the statute which we have quoted, the United States has exclusive jurisdiction over the Presidio for all purposes. An outline of the history of the Presidio and the manner in which this jurisdiction was acquired is contained in *United States v. Watkins*, 22 F. (2d) 437, reference to which is hereafter made.

The Presidio Post Exchange is organized under and does business pursuant to and in accordance with War Department Regulations (R. p. 5). The promulgation of these regulations is authorized by statute (16 Stats. p. 319; 18 Stats. p. 337). The Exchange is thus a creature of Congress, operated as a part of the United States Army under regulations of the Secretary of War, promulgated on behalf of the President as Commander in Chief of the Army. Its uses are official, its operations are precisely restricted and sales can be made only to members of the army, except in remote outposts where civilian employees engaged in army work have no other source of supply (R. p. 56).

The trial court held that the state was without power to impose the tax on the sale to the Presidio Post Exchange, on the ground that the Presidio is not within the state in either a territorial or a jurisdictional sense, exclusive jurisdiction having been ceded to the United States.

On appeal, the Supreme Court of California reversed the trial court, holding that it was the intention of the California legislature to reach the sale in question, and that the Post Exchange is not entitled to exemption as a department of the army performing an official function of the federal government.

The State Supreme Court's opinion is silent on the question whether, even if the legislature had intended to impose the tax, the state had power to invade federal jurisdiction.

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## SPECIFICATION OF ERRORS.

The Supreme Court of the State of California erred:

1. In upholding the validity of the California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, p. 571, chap. 267, as amended by Cal. Stats. 1925, p. 659 and Cal. Stats. 1927, pp. 1308, 1565), when applied to sales of gasoline made within the territorial limits of the United States military reservation at the Presidio, San Francisco, California, to the Presidio Post Exchange.

2. In holding that the State of California, having given to the United States exclusive jurisdiction over certain territory known as the Presidio, for the establishment of a federal military reservation, has the power

thereafter to invade that territory by the imposition of a tax upon sales therein, without the sovereign's consent.

3. In holding that sales and deliveries of gasoline from San Francisco to the Presidio Post Exchange are subject to excise taxes imposed by the California Motor Vehicle Fuel Tax Act (Cal. Stats. 1923, p. 571, chap. 267, as amended by Cal. Stat. 1925, p. 659 and Cal. Stat. 1927, pp. 1308, 1565).

4. In holding that deliveries of gasoline from San Francisco to the Presidio Post Exchange do not constitute commerce within the exclusive jurisdiction of the United States upon which the State of California may not levy a tax or impose a burden.

5. In holding that a sale of gasoline to the Presidio Post Exchange is not a sale to a department of the government of the United States for the official use of the government.

6. In reversing the judgment of the Superior Court of the State of California, with directions to that court to enter judgment for the plaintiff as prayed.

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## SUMMARY OF ARGUMENT.

1. California has ceded to the United States exclusive jurisdiction over the Presidio. It is now without power to invade that jurisdiction by seeking to impose a tax within it.

U. S. Const., Art. I, Sec. 8, Cl. 17;
Cal. Stats. 1897, p. 51;
*Surplus Trading Company v. Cook*, 281 U. S. 647;
*United States v. Unzeuta*, 281 U. S. 138.

2. If the sale here under review be regarded as one initiated in territory under California jurisdiction and concluded in territory under federal jurisdiction it constitutes commerce within the exclusive jurisdiction of the United States.

U. S. Const., Art. I, Sec. 8, Cl. 3;
*Stoutenburgh v. Hennick*, 129 U. S. 141;
*Hanley v. Kansas City Railway Co.*, 187 U. S. 617.

3. The California gasoline tax does not apply to motor vehicle fuel sold to the government of the United States, or any department thereof, for the official use of the government. The Presidio Post Exchange is a department of the United States army, performing an official function of the federal government.

(See pp. 30-40, and Appendix pp. iv-xviii, *infra.*)

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## ARGUMENT.

### I.

### CALIFORNIA HAS CEDED TO THE UNITED STATES EXCLUSIVE JURISDICTION OVER THE PRESIDIO. IT IS NOW WITHOUT POWER TO INVADE THAT JURISDICTION BY SEEKING TO IMPOSE A TAX WITHIN IT.

It appears from the statement, page 4, *supra*, that the sale involved in this action was made in the Presidio. In this regard the trial court said (R. p. 62):

> "The agreed facts settle the inquiry as to sale and delivery, for they show that the sales were not consummated until delivery was effected by the transfer of the fuel from the barrels and tank trucks into the containers at the Post Exchange, within the boundaries of the Presidio."

The United States has exclusive jurisdiction over the Presidio for all purposes. An outline of the history of

the Presidio and the manner in which this jurisdiction was acquired is given in the following extracts from the opinion of the United States District Court for the Northern District of California, in *U. S. v. Watkins*, 22 F. (2d) 437:

"The Presidio of San Francisco has been known as such since some 35 years prior to United States occupation, in use both by Mexican and American governments as a military reservation. By the Treaty of Guadalupe Hidalgo (9 Stat. 922) it, with the rest of the territory comprising the state of California, was ceded to the United States, and in 1850, on the admission of California into the Union, passed without reservation of jurisdiction, to the state of California, the proprietary ownership remaining in the United States. In 1888, in this circuit, an indictment charging the crime of murder committed within the Presidio reservation, was quashed by Circuit Judges Sawyer and Hoffman. The court said: 'We know of no other act of the state of California, through its Legislature or otherwise, by which a retrocession of its sovereign jurisdiction over the Presidio military reservation has been made to the United States. The result is the Presidio reservation is not within the exclusive jurisdiction of the United States. (United States v. Bateman, C. C. 34 F. 86)'

"It is apparent that, for jurisdiction of the United States to have become exclusive, or qualified, since the decision in the Bateman Case, it is necessary that a retrocession of jurisdiction from the state of California to the United States has been made; the extent and nature of the jurisdiction thus ceded depending upon the terms of the grant. In seeming recognition of this fact, the Legislature of the state enacted, in 1891 (St. 1891, p. 262), the following statute:

"'Section 1. The state of California hereby cedes to the United States of America exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of this state and the service of civil process therein.'

"That evidently the act of 1891 was thought insufficient to confer exclusive jurisdiction in the United States, for in 1897 we find the state legislature again passing upon the subject in the following language:

"'Section 1. The state of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this state now held, occupied, or reserved by the government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes: Provided, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated; and provided further, that this state reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this state against any person or persons charged with crimes committed without said lands.' . . .

"Proof adduced at the trial shows that the Presidio lies within the city and county of San Francisco, and that a map of the Presidio, as then constituted, was filed for record in the office of the recorder of the city and county of San Francisco some time in 1897. . . .

> "We have, then, an act of cession of the state of California, with conditions attached. The conditions are shown to have been complied with by the beneficiary, the United States."

The court concludes:

> "We think there can be no doubt about the question, and therefore hold that *the Presidio of San Francisco is under the exclusive jurisdiction of the United States.*"

In the cession of jurisdiction to the United States the State of California reserved no authority of any kind except the right to serve and execute civil and criminal process. In some state grants to the federal government for national parks or other purposes, reservations of the right to tax and of other governmental functions have been made, but this is not the case with the Presidio. The United States must be recognized as having exclusive jurisdiction for all purposes, and since this is so, the Presidio is as much without the State of California as any other state or foreign territory.

The trial court analyzed the effect of cession to the United States in the following manner (R. p. 62):

> ". . . by the Act of March 2, 1897 (Stats. 1897, p. 51) there was a cession by the State to the Federal Government of whatever jurisdiction then remained in the State. The only reservation was the usual one of the right to serve and execute civil and criminal process. The wording of the reservation respecting criminal process limiting it to that only 'against any person or persons charged with crimes committed *without* said lands,' indicates rather clearly an intent to surrender jurisdiction to try and

to punish crimes committed *within* the land ceded. An offense, then, committed in the Presidio would not be in the *State* and hence not cognizable by our courts (see *People v. Mouse*, 203 Cal. 782). This seems to me to be a pretty good test. If exclusive jurisdiction has been transferred, how can it be said that goods delivered in the Presidio are still in the State for the purpose of measuring a tax when a theft of the same goods in the Presidio would not be 'in the State' for the purpose of trial and punishment?"

In the State Supreme Court appellant argued, first, that as matter of construction the legislature did not intend to include Presidio sales because of the uniform language of the taxing act which confines its application to sales "in this state,"* and second, that as matter of jurisdiction, even though the legislature had intended to reach the Presidio sales, it was wholly without power to do so because of the state's surrender of jurisdiction.

The Supreme Court of California has stated at three different places in its opinion** that the Presidio is under

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*Section 3 of the California Motor Vehicle Fuel License Tax Act provides:

"Every distributor shall * * * pay a license tax to the state * * * for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and sold and delivered by him in this state, or imported by such distributor into and distributed or sold by him in this state otherwise than in the original package."

Section 1 (c) of the act defines the distributor as one who sells motor vehicle fuel in this state.

**The State Supreme Court says:

"On March 2, 1897, the legislature of California ceded to the United States government sole legislative jurisdiction over said reservation. . . ." (R. p. 69).

"We thus have presented the question whether sales and deliveries of gasoline at a military reservation under the *sole jurisdiction* of the

the exclusive jurisdiction of the United States (R. p. 70). This would seem in itself to exclude jurisdiction of the State of California, yet the State Supreme Court, without even making effort to show how the state could have power in the matter, held that the statute was applicable to sales in the Presidio simply because it was the intention of the California Legislature that it should apply. The decision, therefore, is contradictory on its face in holding that the statute applies to a subject matter over which the state is admitted to have no jurisdiction.

The decision is also contrary to the cases in which this court has recognized and protected the exclusive character of federal jurisdiction over military reservations. In *Surplus Trading Company v. Cook*, 281 U. S. 647, the State of Arkansas had ceded land to the United States for a military reservation with the single proviso that the grant of jurisdiction should not prevent execution of any process of the state, civil or criminal, upon any person who might be on the reservation. The condition in the California legislative act of cession is substantially the same.

The question in the *Surplus Trading Company* case was whether private personal property located on the reservation might be taxed by the State of Arkansas. The Supreme Court of Arkansas, like the Supreme Court

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United States . . . are to be excluded in fixing the license fees to be paid by the distributor. . . .

"It is at once conceded, as already implied, that the military reservation in question is territory over which the United States exercises *sole legislative authority*" (R. p. 70).

Despite this recognition of exclusive federal jurisdiction, the State Supreme Court dismisses appellant's contention in a single sentence:

"It is our conclusion that the manifest intention of the act was to include all sales completed within the geographical confines of the state, and for this purpose said military reservation was to be included like all other territory" (R. p. 70).

of California in this case, recognized the exclusive jurisdiction of the government of the United States but failed to acknowledge the force of the contention that the tax laws of the state could not be applied to property so located consistently with Article I, Section 8, Clause 17 of the Constitution of the United States.

This court reversed the Supreme Court of Arkansas and held that on account of the unqualified grant of jurisdiction, the state had surrendered its right to levy a tax within the reservation. This court said (p. 651):

> "As respects such a military reservation—that is, one which is neither excepted from the jurisdiction of the state at the time of her admission nor established upon lands purchased therefore with the consent of her legislature—*the state undoubtedly may cede her jurisdiction to the United States and may make the cession either absolute or qualified as to her may appear desirable, provided the qualification is consistent with the purposes for which the reservation is maintained and is accepted by the United States. And where such a cession is made and accepted it will be determinative of the jurisdiction of both the United States and the state within the reservation.*
>
> "But Camp Pike is not in the same class with any of the reservations of which we have spoken and should not be confused with any of them. Nor should it be confused with military or other reservations within a Territory of the United States. It is not questioned, nor could it well be, that Camp Pike comes within the words 'forts, magazines, arsenals, dock-yards, and other needful buildings' in the constitutional provision. The land therefor was purchased by the United States with the consent of the legislature of the State in 1917. The constitutional

provision says that Congress shall have power to exercise 'exclusive legislation in all cases whatsoever' over a place so purchased for such a purpose. 'Exclusive legislation' is consistent only with exclusive jurisdiction. It can have no other meaning as to the seat of government, and what it means as to that it also means as to forts, magazines, arsenals, dock yards, etc. That no divided jurisdiction respecting the seat of government is intended is not only shown by the terms employed, but is a matter of public history. Why as to forts, magazines, arsenals, dock yards, etc., is the power given made to depend on purchase with the consent of the legislature of the State if the jurisdiction of the United States is not to be exclusive and that of the State excluded?

"The question is not an open one. It long has been settled that where lands for such a purpose are purchased by the United States with the consent of the state legislature the jurisdiction theretofore residing in the State passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction."

Appellant contends that if Arkansas is unable under the ruling of this court, in the *Surplus Trading Company* case, to tax tangibles, even though privately owned, at a military reservation, authority over which has been ceded by the state, California cannot levy an excise or license or privilege tax upon a transaction which admittedly took place entirely within the Presidio and similarly outside of state jurisdiction, because of unqualified cession.

This court early established in *State Tax on Foreign Held Bonds*, 82 U. S. 300; 319, that subjects of taxation, whatever their character, must be within the jurisdiction

of the taxing state and that this rule applies to all subjects of taxation alike, whether they be persons, property or business. This court said:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and *business*. Whatever form taxation may assume, whether as duties, imposts, *excises*, or *licenses*, it must relate to one of these subjects."

The event, and the sole event, which calls the California gasoline tax act into operation is a sale within the state. The act refers only to sale within the state as the taxable incident, and the California Supreme Court has not suggested any other construction. On the contrary, that court itself defines the question presented here, as "whether sales . . . at a military reservation under the sole jurisdiction of the United States are to be excluded in fixing the license fees".

Furthermore, whether the California gasoline tax be described as a sales tax or business tax or distributors' tax, the sale was made, the business done, and the distribution accomplished entirely within the Presidio and the state has no power to impose a license or excise tax there.

If the decision of the State Supreme Court were to stand it would be consistent for the assessor in San Francisco to seek to include on his rolls the tangible personalty of the officers and enlisted men at the Presidio.

Reference may also be made to the decision of this court in *United States v. Unzeuta*, 281 U. S. 138. This

case involved the question whether a crime committed on a military reservation belonging to the United States which had been ceded to it by the State of Nebraska was punishable by the United States because it had acquired exclusive jurisdiction over the property. This court held that the situation was governed by the terms of the cession, and since no express reservation had been made by the state it was totally without jurisdiction and federal authority was established. This court said (p. 142):

> "The terms of the cession, to the extent that they may lawfully be prescribed, determine the extent of the federal jurisdiction.
>
> "In the present instance, there is no question of the status of the Fort Robinson Military Reservation. Nebraska ceded to the United States its entire jurisdiction over the reservation save in the matter of executing process and opening and repairing roads or highways. It was in this view that the Federal Circuit Court decided that, after this jurisdiction had been accepted by the United States, it could not be recaptured by the action of the state alone, and hence that an act of the legislature of Nebraska, passed in 1889, seeking to amend the act of cession was not effective, and that the statutes of the state regulating the sale of liquors were not in force within the ceded territory. *In re Ladd*, 74 Fed. 31. The conditions of the cession relating to the execution of criminal process were construed as intended to save the right to execute process within the reservation for crimes committed outside, that is, to prevent the reservation from being a sanctuary for fugitive offenders."

In *Concessions Co. v. Morris*, 109 Wash. 46, 186 Pac. 655, the Supreme Court of Washington held that personal property belonging to the plaintiff and situate on Camp Lewis military reservation was outside of the state and therefore not subject to personal property taxation levied under the laws of the state. The court said:

> "Under our law, Rem. & Bal. Code, section 9101, only personal property in the state of Washington can be listed for taxation, and the question, therefore, must be answered by a determination of whether personal property situated upon this military reservation is in the state of Washington. It seems to us that the answer to this is clear, and that such property is without the state in both a jurisdictional and territorial sense, for, as we have seen by the Constitution of the United States, and the act of the Legislature of this state, both the military reservation itself and the jurisdiction and legislation over it have been granted to the United States, and thereby there has been created an independent sovereignty the territory of which is surrounded by the state of Washington, but over which the state of Washington has no jurisdiction. A territory has been created which resembles that of the District of Columbia, the only reservation being that the state of Washington can serve civil and criminal process therein on actions arising outside the reservation."

In *Yellowstone Park Transportation Co. v. Gallatin Co. et al.*, 31 F. (2d) 644 (certiorari denied, 280 U. S. 555), the Circuit Court of Appeals for the Ninth Circuit held that after the state's cession to the United States of exclusive jurisdiction over Yellowstone National Park, reserving only the right to serve and execute process, the state taxing laws became wholly inoperative over the

Park and personal property located there was not subject to the state tax. The court referred to the case presented in *Arlington Hotel Co. v. Faut*, 278 U. S. 439 (where the right to tax was reserved), as follows:

> "In 1903 the Legislature of the state of Arkansas (Acts 1903, p. 52) ceded to the United States exclusive jurisdiction over certain territory surrounding the Hot Springs in that state, reserving only the right to execute civil and criminal process and the right to tax, and in Arlington Hotel Co. v. Faut, 176 Ark. 613, 4 S. W. (2d), 7, it was held that a statute enacted by the state Legislature after the date of cession, restricting the liability of innkeepers, was inoperative within the ceded territory."

and concluded that

> "after the date of cession, the ceded territory was as much without the jurisdiction of the state making the cession as was any other foreign territory, except in so far as jurisdiction was expressly reserved. For this reason, the taxing laws of the state of Montana are wholly inoperative in that portion of the Yellowstone National Park within the territorial limits of the state."

The precise question presented in this case has been decided in favor of our contention by the United States District Court for the District of Maryland in *United States v. Cordy*, 38 F. (2d) 1013.

The Maryland gasoline tax act imposes the tax upon the dealer in motor vehicle fuel and defines him to be "any person . . . who imports . . . gasoline . . . for use, distribution or sale and delivery *in*, and after the same reaches *the State* of Maryland." The same definition is made applicable to any person producing, refin-

ing, manufacturing or compounding motor vehicle fuel *in the state* for use, distribution or sale and delivery *therein.* The California act, as we have seen, requires the payment of the tax "for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor *in this state* and sold and delivered by him *in this state* or imported . . . and distributed or sold . . . in *this state* otherwise than in the original package."

The Maryland act provides that the tax "shall not be imposed on motor vehicle fuel when exported or sold for exportation from the State of Maryland to any other state or nation." The California act, Section 10, exempts from tax "any motor vehicle fuel exported or sold for exportation and exported for use outside this state."

The similarity of the provisions of the two acts is immediately apparent. In *United States v. Cordy*, the Maryland taxing authorities attempted to impose the gasoline tax upon deliveries made from the State of Maryland to the Post Exchange at Fort Meade, a military reservation of the United States Government. The United States District Court for the District of Maryland construed the act as taxing only sales and deliveries in the State of Maryland, and held that since Fort Meade is exclusively federal territory, sales to the Post Exchange situated in it are free from tax.

In referring to the federal ruling in Maryland, the California Supreme Court (R. p. 70) stated that the decision was based "upon the peculiar provisions of the act there involved". A comparison of the quoted provisions of the Maryland and California acts shows that they are practically identical in jurisdictional and geographical scope

and text, and that in each case the operation of the statute is confined to transactions within the state. There is no language in the Maryland act differing from the California law which places military reservations in a class apart or excludes sales made there. The California decision, therefore, cannot be based on any difference in the terms of the two statutes.

In concluding this point, we submit that the position taken by the trial court in this case is sound (R. p. 65):

> "I am satisfied that after exclusive jurisdiction is ceded a military reservation remains within the State from which it was carved only in a broad, general and geographical sense; that it becomes United States territory and that in no *legal* sense does it remain within the State; that it certainly is not within the State's taxing jurisdiction any more than it is within the State's criminal jurisdiction."

On this question of paramount importance, the California Supreme Court in this case has not said a word.

## II.

### IF THE SALE HERE UNDER REVIEW BE REGARDED AS ONE INITIATED IN TERRITORY UNDER CALIFORNIA JURISDICTION AND CONCLUDED IN TERRITORY UNDER FEDERAL JURISDICTION IT CONSTITUTES COMMERCE WITHIN THE EXCLUSIVE JURISDICTION OF THE UNITED STATES.

In one sense, this point may be regarded as a corollary of the proposition that the federal government alone has jurisdiction over the Presidio. It is, however, a point of independent force, in placing the invalidity of the tax upon

two alleged grounds: (1) the tax violates the commerce clause of the federal constitution, and (2) if it be argued that commerce between San Francisco and the Presidio is not interstate, the answer is that in any event a state has no power to regulate or burden commerce passing beyond its borders.

**(a) Decisions sustaining a tax upon the withdrawal, storage or use of gasoline within a state have no application here.**

It has been made to appear that the California gasoline tax act levies the tax only with reference to a sale. In point of fact, the tax is imposed only when sales are made for vehicular use on highways. Gasoline for all other uses is exempt and there is no tax on withdrawal or storage. The statutes of other states which have recently been reviewed by this court, and in which sale was not the sole privilege taxed, but withdrawal, storage or usage were also included in the text of the act, have therefore no application here.

In *Edelman v. Boeing Air Transport, Inc.*, 289 U. S. 249, decided last April, this court had before it the Wyoming gasoline tax act which imposes the tax upon all gasoline sold *or used* in the state. This court held that the tax applied to stored gasoline as it was withdrawn from the storage tanks, and that at the time of withdrawal "use" was measured for the purposes of the tax. Stored gasoline was deemed to be "used" within the state and, therefore, subject to the tax, when withdrawn from the tanks. In this way, gasoline subsequently devoted to interstate commerce purposes was held to come properly within the scope of the Wyoming act.

In *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U. S. 249, the Tennessee gasoline tax act was up for

review. Under specific provisions of the act, the tax applied to persons storing gasoline and distributing it or allowing it to be withdrawn from storage, whether such withdrawal was for sale or other use. In the language of this court (p. 265):

> "Storage of the gasoline and withdrawal of it from storage within the state for use or sale are, as the State Supreme Court has held, the events which, by the very terms of the statute, call it into operation."

Compare the California statute and situation. Sale within the state is alone the taxable event. Use for purposes other than vehicular traffic on highways is exempt under Section 11 of the act, and purchasers for such other purposes are entitled to refund (Appendix p. iii).

In *Hart Refineries v. Harmon*, 278 U. S. 499, this court considered the Montana statute, which, like the California act, taxes sales but not use. This court held that although a state may tax the use as well as the sale of gasoline, a state law taxing sales alone is not invalid and discriminatory because it lays no tax on use. The distinction for which we are here contending is well exemplified in this case.

In *Bowman v. Continental Oil Co.*, 256 U. S. 642, this court sustained the New Mexico tax upon the use, as well as sale, of gasoline, and held that a local excise tax as applied to local sale and use of gasoline by a distributor who has imported his product does not violate the commerce clause. Here again use or sale within the state are made to support the tax.

At the risk of repetition we reassert that the elements present in these cases are excluded in the case of the

California statute. Not only is sale within the state made the only basis with reference to which the tax can be levied, but use, as such, is expressly made nontaxable by the refund provisions, and withdrawal and storage are not mentioned. The legislative intent in this regard may be readily understood in a state in which gasoline manufacture and consumption for highway purposes are substantial.

**(b) Decisions sustaining a tax upon property situated or sales made within a state have no application here.**

Our situation is not to be confused with that presented in the line of cases exemplified by *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U. S. 147. The *Eastern Air Transport* case involved the South Carolina gasoline tax on sales made within the state to airplanes engaged in interstate commerce. This court found no difficulty in holding that whether the gasoline tax was an excise tax imposed on the sale or a property tax levied on the gasoline itself, the levy was valid because the sale took place within the state and the property was in the state at the time of sale. The essential ground upon which the opinion rests is shown in the following extracts from it (p. 152):

> "The appellant emphasizes the fact that the tax has been construed by the Supreme Court of the state to be an excise tax and not a property tax . . . So far as the present question is concerned, the distinction is not important. If such a license tax for the privilege of making sales *within the state* were regarded as in effect a tax upon the goods sold, its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within

> the state and hence subject to the state's authority to tax, although the property might actually be used in interstate commerce . . . Treating the tax as an excise tax upon the sales does not change the result in the instant case, as the sales are still purely intrastate transactions . . .
>
> "Undoubtedly, purchases of goods within a state may form part of transactions in interstate commerce and hence be entitled to enjoy a corresponding immunity. But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a nondiscriminatory tax imposed by the state upon intrastate dealers . . .
>
> "There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier."

Contrast the situation in the present case. The sale here involved was not made within the state and the property was not in the state when the sale was consummated. The carriage of the gasoline originated in San Francisco, but the sale did not take place until delivery was made at the Presidio. If the gasoline had been sold in San Francisco to motor carriers engaged in making deliveries of merchandise in the Presidio, or to airplane carriers making flights over the Presidio, this case would come within the ruling in the *Eastern Air Transport* decision and the tax would be payable. But this is not what has occurred. The seller itself, and not the buyer, transported the gasoline into the Presidio in the first instance and there the sale was made.

The point may here be noted, to anticipate respondent, that the *Eastern Air Transport* case is authority against one of the points earnestly argued by the state. The Attorney General of California has contended that since some of the gasoline sold in the Presidio later finds its way in motor vehicles to the highways of the state, it is proper that the state tax should be levied. In the *Eastern Air Transport* decision, however, this court points out clearly that the use to which a commodity is put after sale has no bearing whatever on the tax.

*Stoutenburgh v. Minnesota*, 283 U. S. 57, relied upon by the Attorney General below, may be placed in the same category as the decision in the *Eastern Air Transport* case. It upholds a Minnesota statute requiring registration of motor vehicles in order that they may be privileged to use the public streets and highways in the state. The case comes clearly within the principles announced in the *Eastern Air Transport* case that when property is situated or a privilege is exercised within a state, it comes properly within the taxing power of the state. If California wished to register and license motor vehicles coming from the Presidio and using the highways or to tax any motor car after coming within the borders of the state for the privilege of using the highways there would be no constitutional obstacle in the way. The California legislature has not, however, imposed such a tax.

Reference may be made to a third case heretofore cited by the Attorney General, *Interstate Transit Co. v. Lindsey*, 283 U. S. 183. In this case the Tennessee tax on interstate motor buses, graduated according to carrying capacity, was held to be a privilege tax on the carrying on of interstate business and repugnant to the commerce

clause. This court pointed out that if the tax were a mileage tax or if the levy bore some reasonable relation to the privilege of using the highways it would have been upheld. Neither of these conditions is met in this case. On the contrary, if the full amount of the California tax were applied to gasoline passing beyond the borders of the state it would come within the prohibition enforced in the *Interstate Transit Co.* case. The levy would be invalid for the further reason that it would be measured by gross sales, a method condemned by this court in *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292.

**(c) The California law exempts "any motor vehicle fuel exported outside this state".**

Section 10 of the California gasoline tax act (Appendix, p. iii), recognizing the inability of the state to tax shipments for sale or delivery outside of state jurisdiction, expressly exempts "any motor vehicle fuel exported or sold for exportation and exported for use outside this state." The situation is precisely the same as it would be if the gasoline had been shipped for delivery in Nevada instead of in the Presidio. Indeed, it is stronger because in the case of the sale here involved it is stipulated that delivery was made in appellant's tank-trucks, the expense and risk of loss in making delivery were borne by appellant and the place of sale was the Presidio. In export sales the seller not infrequently appropriates specific gasoline to the contract of sale and title passes at the point of origin. Such sales are none the less exempt from tax. For a stronger reason the exemption must apply when the gasoline moves beyond state jurisdiction before the sale is made.

The Attorney General suggested in the California Supreme Court that the allegations of the answer are insufficient to support our contention that the exemption of motor vehicle fuel exported from the state applies in this case. The answer alleges that "defendant did sell and deliver 120 gallons . . . of motor vehicle fuel . . . to the Presidio Post Exchange at San Francisco." The agreed statement records fully the attendant facts. The case was tried and argued in the trial court on the theory that the effect of transportation from San Francisco to the Presidio was one of the major issues in the case. Even though the pleadings were insufficient, which is not the case, the theory upon which the trial proceeded and the written statement of facts made by the parties would waive the necessity of amendment. *County of Butte v. Merrill*, 141 Cal. 396.

**(d) The status of the Presidio is similar to that of the District of Columbia; and a state cannot burden or regulate commerce passing between it and the District.**

We have seen that the Presidio is "an independent sovereignty . . . which resembles . . . the District of Columbia" (*Concessions Co. v. Morris*, p. 17, *supra*). This court has ruled that an attempted tax upon commerce between the District and the states of the Union is invalid.

*Stoutenburgh v. Hennick*, 129 U. S. 141, involved an act of the Legislative Assembly of the District of Columbia relating to license taxes on persons engaged in trade or business within the District. This court held that the provision in the act which sought to require commercial agents offering goods for sale by sample to take out a license was invalid as a regulation of interstate commerce

when applied to solicitors acting for firms doing business outside the District. In *Robbins v. Shelby Taxing District*, 120 U. S. 489, this court had held invalid a tax upon drummers acting in one state for a principal situate in another state. The reasoning followed and the canons announced in that case were applied in the *Stoutenburgh* case to commerce between a state and the District of Columbia. This court said:

> "The power granted to Congress to regulate commerce is necessarily exclusive whenever the subjects of it are national or admit only of one uniform system or plan of regulation throughout the country, and in such case the failure of Congress to make express regulations is equivalent to indicating its will that the subject shall be left free; that in the matter of interstate commerce the United States are but one country and are and must be subject to one system of regulations, and not to a multitude of systems; and that a state statute requiring persons soliciting the sale of goods on behalf of individuals or firms doing business in another state to pay license fees for permission to do so, is, in the absence of congressional action, a regulation of commerce in violation of the Constitution. The business referred to is thus definitively assigned to that class of subjects which calls for uniform rules and national legislation, and is excluded from that class which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively . . . . It falls, therefore, within the domain of the great, distinct, substantive power to regulate commerce, the exercise of which cannot be treated as a mere matter of local concern, and committed to those immediately interested in the affairs of a particular locality."

In *Washington Electric R. Co. v. Waller*, 280 Fed. 508, it was held that a passenger on an electric railway car, who had a ticket from Annapolis to Washington, was an interstate passenger and that a Maryland statute requiring segregation of white and colored passengers could not be enforced against him. See also *Hart v. State*, 100 Md. 595, to similar effect.

**(c) The commerce clause is not confined to commerce between states.**

*Hanley v. Kansas City Southern Railway Co.*, 187 U. S. 617, applies the rule against burdens on interstate commerce to shipments passing from a state through a territory. Citing the *Stoutenburgh* case this court said:

> "It may be assumed that this power of Congress over commerce between Arkansas and the Indian Territory is not less than its power over commerce among the states."

It is established, therefore, that the commerce clause of the federal constitution is not confined to commerce between states. It has been construed to include transportation from a state to the District of Columbia and from a state to a territory. With equal force it is applicable to a shipment from San Francisco to the Presidio. Whether we call such commerce interstate or describe it simply as commerce passing beyond the borders of the state, the distinction is unimportant. In either case the state has no power to regulate or burden it and Congress has exclusive jurisdiction over it.

## III.

**THE CALIFORNIA GASOLINE TAX DOES NOT APPLY TO MOTOR VEHICLE FUEL SOLD TO THE GOVERNMENT OF THE UNITED STATES OR ANY DEPARTMENT THEREOF FOR THE OFFICIAL USE OF THE GOVERNMENT. THE PRESIDIO POST EXCHANGE IS A DEPARTMENT OF THE UNITED STATES ARMY, PERFORMING AN OFFICIAL FUNCTION OF THE FEDERAL GOVERNMENT.**

The California gasoline tax act* provides, Section 10, that the act shall not apply "to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government." The Presidio Post Exchange is organized under and does business pursuant to and in accordance with War Department regulations (R. p. 5). The promulgation of such regulations is authorized by statute (16 Stat. 319, 18 Stat. 337). In addition, promulgation of rules to govern the Army is within the constitutional powers of the President as Commander in Chief, and the rules when sanctioned by the President have the force of law. This sanction may be either express or implied. Legislative ratification is also implied when Congress permits regulations to be promulgated and carried into effect from year to year. These regulations have the force of law.**

*Cal. Stats. 1923, p. 571, as amended by
Cal. Stats. 1925, p. 639; Stat. 1927, p. 1308; and
Cal. Stats. 1929, Ch. 48, p. 112, Ch. 552, p. 935, and
Ch. 779, p. 1531 (Two Cent Tax Act).
See also:
Cal. Stats. 1927, p. 1565, as amended by Cal. Stats. 1929,
Ch. 208, p. 367 (One Cent Tax Act).

**See:
*Henry Woog, Administrator v. U. S.*, 48 Ct. Cl. 80, 88-9;
*Dugan v. U. S.*, 34 Ct. Cl. 458, 4 Am. Fed. Tax Repts. 4922, 4925;
*Kurtz v. Moffett*, 115 U. S. 487, 503;
*United States v. Freeman*, 3 How. 556, 567;
*Smith v. Whitney*, 116 U. S. 167, 181;
*Willoughby on the Constitution of the United States*, p. 1566;
*United States v. Eliason*, 16 Pet. 291, 301;
*Gratiot v. U. S.*, 4 How. 80, 117-18;
*Maddux v. U. S.*, 20 Ct. Cl. 193, 198;
*Ex Parte Reed*, 100 U. S. 13, 22;
*Federal Constitution*, Art. 2, Sec. 2 and Art. 1, Sec. 8, Clauses 12, 13, and 14.

**(a) Summary of War Department regulations governing post exchanges.**

Congress has recognized post exchanges since 1903 by providing periodic appropriations for the construction, equipment and maintenance of post exchange buildings.* The primary purposes of exchanges are defined in the Regulations (R. p. 9):

> "(1) To supply troops, at the lowest possible prices, with articles of ordinary use, wear and consumption not supplied by the Government.
>
> "(2) To afford to troops means of rational recreation and amusement.
>
> "(3) Through exchange profits to provide, when necessary, the means for improving the company messes."

An exchange is authorized to maintain a gasoline filling station (Army Regulations, 210-65, par. 5, a, subd. 1; R. p. 9). Sales to civilians were at first permitted to civilian employees of the post, but by amendment to the regulations contained in War Department Circular 57, dated October 31, 1929, the only civilian employees who may purchase are members of a foreign expeditionary force and those employed with the Army and quartered at stations so located as to make the purchases from civilian agencies impracticable.

The members or stockholders of a post exchange are the companies or similar units stationed at the post (A. R. 210-65, par. 8, a; R. p. 10). Under a ruling of the Acting Secretary of War, dated April 20, 1906, membership in

*32 Stat. 937, 938; 33 Stat. 270; 33 Stat. 836; 34 Stat. 253, 1169; 35 Stat. 149, 516, 744; 36 Stat. 255, 1050; 37 Stat. 582, 619, 715; 38 Stat. 364, 1076; 39 Stat. 636; 40 Stat. 56, 195, 363, 479, 830, 862, 1029; 41 Stat. 118, 963, 1184; 42 Stat. 83, 719, 1056, 1167, 1380; 43 Stat. 480, 711, 895; 44 Stat. 190, 256, 1108; 45 Stat. 49, 329, 1352.

the post exchange is not obligatory on the military units of the garrison (par. 8, b; R. p. 11, and par. 81, b; R. p. 50) but in actual practice, all such units, except possibly small detachments, become members of post exchanges. Application for membership by companies or similar units is made by the commanding officer (par. 9; R. p. 13). The business of the exchange is conducted by an exchange officer detailed for that purpose (par. 17; R. p. 17) under the supervision of the post exchange council (par. 16, c; R. p. 15) and subject to the control of the commanding officer of the post (par. 2; R. p. 8). The post exchange council consists of the commanding officers of the participating units. The method of management, keeping of records, auditing of accounts, and other operating directions, are prescribed by Army Regulations. The commanding officer, post exchange officer, and members of the post exchange council perform their duties not as volunteers, but as part of their official duties.

The profits of the post exchanges are distributed (par. 8, d; R. p. 11) in proportions fixed by regulations, for supplementing governmental allowances for military bands, for the post recreation fund, the cultivation of gardens, purchase of books for the post library, the purchase of gymnastic appliances and prizes for athletic sports, for the chaplain's fund and for the benefit of the organization funds of the separate units composing the membership of the post exchange. The various funds to which these profits are distributed are in turn expended for the purposes prescribed by Army Regulations 210-50. Each of these funds serves a governmental purpose, including the improvement of messes, contribution to the contentment and mental and physical improvement of troops, the benefit

of the sick in hospital, welfare work, aiding the activities of bands, and for moral, religious and educational purposes. No part of the profits is distributed to any individual for personal or private use.

*In this application of the proceeds of post exchange earnings lies full justification for holding that exchanges are federal instrumentalities. They provide the funds for garrison purposes which Congress itself would otherwise have to supply in decent regard for the welfare of military personnel and the proper equipment of military posts.*

The fact is stipulated that the Presidio Post Exchange is operated under and in conformity with the regulations, the pertinent parts of which have been summarized (R. p. 5). The exchange is a creature of Congress, operated as a part of the United States Army under the regulation of the Secretary of War, promulgated on behalf of the President as Commander in Chief of the Army. It is, therefore, as much a department of the United States Army as the commissary department of the Quartermaster Corps. Its uses are official, its operations are precisely restricted, and its sales can be made only to members of the Army, except in remote outposts where civilian employees engaged in army work have no other source of supply.

**(b) History and development of post exchanges.**

A brief history of the development of the post exchange shows how it obtained its present character as an instrumentality of the federal government. The first enactment designed to provide troops with supplies for their well-being and comfort, but of such nature that they could not be conveniently furnished as a part of the Army ration, established the office of sutler (Sec. VIII, Art. 3, Articles

of War, September 20, 1776). The sutlers supplied troops with required merchandise and other articles, including beer and wines, under War Department regulations. The office of sutler was abolished July 28, 1866 (14 Stat. 336), and the subsistence department of the Army was required to furnish supplies designated by the Inspectors General of the Army, to be sold to the officers and enlisted men at cost price to be deducted from pay (14 Stat. 336, sec. 25). Thereafter post traders were licensed to operate on military reservations, and canteens or social clubs were organized by military personnel from private funds. Finally, post exchanges were organized under General Orders No. 10, Adjutant General's Office, February 1, 1889. By the Act of January 28, 1893 (27 Stat. 426), and under new regulations promulgated in 1895 (General Orders 46, Hdqrs. of the Army, July 25, 1895), the present post exchanges were established, superseding both post traders and canteens.

Appellant has not discovered any ruling or statement by this court defining the nature of an army post exchange. The question has, however, been considered on occasion by the lower courts and is the subject of numerous decisions of the War Department, the Judge Advocate General and the Navy Department. These decisions and rulings are assembled and analyzed in the Appendix at pages iv to xviii.

**(c) States cannot tax sales to federal agencies.**

Before the decision of this court in *Panhandle Oil Company v. Mississippi*, 277 U. S. 218, the War Department had conceded in a few instances that certain kinds of taxes were payable by post exchanges. These rulings are not, however, to be construed in any sense as a recession from

the position consistently maintained that the exchanges are official branches of the government. The taxes involved were held payable solely because they were deemed to be levied either upon the goods themselves or upon the business of selling, including sales to the government. See, for example, Ops. J. A. G. 012, 412, September 25, 1923, holding certain articles imported through post exchanges subject to duty, since the "tariff act did not exempt from tariff duty supplies imported for the use of the Government"; Ops. J. A. G., February 28, 1919 (mentioned in A. R. 210 65, par. 77, c), holding that the federal floor tax on tobacco was payable by post exchanges because *it was a tax on the articles sold to the government*; and Ops. J. A. G., Dig. 1922, p. 45, holding the government liable for the Kentucky gasoline tax on the theory that the levy was a tax imposed upon the business of selling gasoline to the government.

This latter ruling was reversed when this court held in the *Panhandle Oil Company* case, *supra*, that the Mississippi gasoline tax, even though levied on the business of selling, could not be applied to sales to an instrumentality of the United States. The Mississippi act provided that the tax be paid by the distributor for the privilege of distributing gasoline in the state. The State Court upheld the tax on sales to the United States Veterans' Hospital and to the United States Coast Guard, and construed the levy as a privilege tax on the dealer for the right to carry on the business, the measure of the tax being the gallonage sold. Since the tax was construed as a privilege tax instead of a direct tax, the court thought that it was not a charge upon any federal agency. This court held otherwise and said (p. 221):

> "While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the State, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes. . . .
>
> "Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers."

In *Graubarg Oil Co. v. State*, 286 S. W. 489, 3 S. W. (2nd) 127, the Court of Civil Appeals and Commission of Appeals of Texas held the Texas gasoline tax applicable to sales to the United States government at a military reservation. The act provided that "every person selling at wholesale in intrastate commerce in this state any gasoline shall pay to the State of Texas an occupation tax equal to one cent per gallon of all such gasoline so sold by such person." There was no express exemption of government agencies, as in the California statute, but this court nevertheless reversed the decision of the Texas courts (278 U. S. 582) on the authority of the *Panhandle Oil Company* case.

**(d) The California gasoline tax comes directly within the prohibition enforced by this court in the Panhandle Oil Company case.**

The nature of the California gasoline tax has been defined by the Supreme Court of California in *People v. Ventura Refining Co.*, 204 Cal. 286, 294:

> "The clear intent of the law was to levy an excise or occupation tax upon distributors of motor vehicle fuel, *giving such distributors, however, ample opportunity to fully indemnify themselves by adding the amount of the tax to the selling price of the fuel* and thus in effect collect the tax from the consumer."

The ruling in *Old Homestead Bakery, Inc., v. W. H. Marsh*, 75 Cal. App. 247, 256 6, is similar:

> "It is true that the license tax of two cents per gallon on all fuel gas sold and distributed by those engaged in the business of selling the same for motor vehicle purposes is not a direct license tax upon those owning or using such vehicles, yet, that the act operates indirectly to impose upon the owners or operators of such vehicles a tax of two cents on every gallon of gas that they purchase for use in propelling motor vehicles, is, from the very nature and logic of the situation, indisputably true. This proposition irresistibly follows from the fact that taxes assessed against the goods and wares of the vendor thereof and by him paid are always included in so called 'overhead expenses,' and, of course, *constitute an element in the fixing of the market value of the goods, or, at all events, is an element of the cost of the goods to the consumer.*"

These decisions bring the California gasoline tax, as applied to purchases for the use of the federal government, clearly within the prohibition of the *Panhandle* and *Graybar* cases.

It will be noted that section 10 of the California statute excluding from taxation sales "to the United States of America or any department thereof" was amended (Cal. Stats. 1927, p. 1308) by adding the words "for the official use of said government." This provision imposes no new

limitation for all sales to the United States or a department thereof are necessarily for the official use of the government.

It is not inappropriate in concluding this portion of our argument to quote from a War Department Memorandum which well describes the official character of the post exchange as a federal agency:

> "Though education, of at least a primary and common school variety, is recognized throughout America as a cardinal obligation of governments, the Congress has made no provision for supplying such needs of the children of its military personnel stationed on reservations over which exclusive jurisdiction has been ceded the United States; notwithstanding, that, while so inhabiting such reservations the educational advantages of schools, accorded by states to their inhabitants, are not to be enjoyed by such military personnel, except as a matter of grace and indulgence on the part of the states, even though the military reservation is entirely surrounded by the state within the geographic limits of which it is situated (6 Op. Atty. Gen. 577). Except the post exchange profits as are allotted for supplying education to the children of such military personnel, no quasi-public nor public funds are devoted to discharging this governmental obligation there to do.
>
> "To supply this deficiency, among other things, and to discharge governmental obligations in the lawful exercise of constitutional powers, the post exchange system has been inaugurated, established and is being maintained with Congressional sanction—even dependence, since profits from post exchanges are utilized 'for the purpose of assisting in the payment of the tuition of the children of enlisted men only, to such extent as may be authorized by commanding officers; or for the establishment of schools

for such children on military reservations, or to otherwise assist in their education.'

"Only slightly less obligatory in character is the governmental propriety and desirability of fostering the moral and religious lives of its military personnel. The Congress having made no appropriation, aside from the pay and allowances of chaplains, for the laudable, if not indispensable, propagation of the benefits of the Christian religion among its regular soldiery, such is prescribed as one of the objects to which post exchange profits may be devoted. Thus is afforded the only funds either quasi-public or public which may lawfully be expended for the dissemination of religious teachings and moral training on military reservations.

"Aside from the support furnished education and religio-moral undertakings, profits from post exchanges are devoted to providing, or supplementing provisions made by the Congress, for those things which the President, the Commander-in-Chief of the Army, acting through the Secretary of War, considers desirable, perhaps even necessary, to the proper maintenance of the nation's military establishment.

"The testimony of the then Secretary of War before the House Military Affairs Committee of the 69th Congress at its 2d Session, Jan. 10, 1927, relative to the Army ration, reveals sharply the governmental functions served by post exchanges, in aid of which a portion of its profits are expended. He states, *inter alia*:

"That the ration 'is too small, I think, as shown by the fact that in practically every case I know of where any funds are available, company funds or *post exchange funds*, or anything of that sort, they are actually being used and have been used for years

> in supplementing the ration . . . *the profits of these post exchanges* and similar funds are really taken from the men themselves and if those profits are put back into 'the feeding of the men, they are actually paying a certain part of their own food cost' (p. 712, Vol. 2, 69th Cong. Hearings House and Senate). See also to the same effect the testimony of the Quartermaster General at that hearing. Id. p. 740" (Memorandum of Lester S. Hill, Jr. Major J. A. G. D. Ch. Civ. Affairs, Section No. 1—J. A. G. 463.7, Sept. 21, 1929).

For the reasons given we respectfully urge that the post exchange is as much a part of the war department as the commissary or the quartermaster corps. It is thus a department of the federal government, its purposes are official and the California gasoline tax cannot be applied to sales made to it. The California statute expressly exempts such sales and the exemption is required by the federal constitution.

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## IV.

### CONCLUSION.

It is respectfully submitted that the decision of the Supreme Court of California should be reversed and that of the trial court affirmed.

Dated, San Francisco,
December 11, 1933.

OSCAR SUTRO,
FELIX T. SMITH,
VINCENT K. BUTLER, JR.,
*Attorneys for Appellant.*

# Appendix

## I.

### PERTINENT SECTIONS OF THE CALIFORNIA MOTOR VEHICLE FUEL LICENSE TAX ACT.

Section 1. The following words, terms and phrases shall whenever used in this act, have the meaning set forth in this section.

(a) "Motor vehicle" shall include every vehicle operated upon the highways of this state which is propelled by the use of motor vehicle fuel.

(b) "Motor vehicle fuel" shall include all gasoline, distillate, benzine, naptha, liberty fuel and other volatile and inflammable liquids produced or compounded for the purpose of, or which may be used in, operating or propelling motor vehicles, except kerosene and except unfinished products requiring rerun, blending, or compounding and which are not used or sold for use in such form for the purpose of operating or propelling motor vehicles.

(c) "Distributor" shall mean and include every person, firm, association or corporation who refines, manufactures, produces or compounds motor vehicle fuel in this state and sells the same in this state; also every person, firm, association or corporation who imports any motor vehicle fuel into this state and sells the same in this state whether in the original packages or containers in which it is imported or otherwise than in such original packages or containers; or imports any such fuel for his own use in this state; also every person, firm, association or corporation who, having acquired in this state in the original package or container motor vehicle fuel which has

been imported into this state, shall distribute or sell the same, whether in such original package or container in which the same was imported or otherwise than in such original package or container.

(d) "Service station" is a place operated primarily for the purpose of delivering motor vehicle fuel into the fuel tanks of motor vehicles (Cal. Stats. 1923, chap. 267, p. 571).

Sec. 3. Every distributor shall from and after September 30, 1923, in addition to any other taxes provided by law, pay a license tax to the state controller of this state of two cents for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and sold and delivered by him in this state, or imported by such distributor into and distributed or sold by him in this state otherwise than in the original package or container in which such motor vehicle fuel was imported into this state, and for each gallon of motor vehicle fuel imported into this state and thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter distributed or used by such distributor or sold by him otherwise than in the original package or container in which the same was imported into this state and for each gallon of motor vehicle fuel sold, distributed or used by him from any stock on hand or held in storage by him on September 30, 1923. From any amount found to be due upon any report hereunder the distributor shall first be allowed to deduct one per cent of the tax otherwise due hereunder to cover subsequent losses occasioned by evaporation and handling (Cal. Stat. 1923, chap. 267, p. 572).

Sec. 10. The provisions of this act requiring the payment of license fees shall not be held or construed to apply to motor vehicle fuel imported into this state in interstate or foreign commerce and intended to be sold in the original and unbroken tank cars or other original receptacles, containers or packages and so sold while the same are in interstate or foreign commerce nor to any motor vehicle fuel exported or sold for exportation and exported for use outside this state, nor to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government but every distributor shall be required to report such exports and sales to the state board of equalization in such detail as that board may require (Cal. Stats. 1923, p. 572, as amended by Cal. Stats. 1925, p. 660 and Cal. Stats. 1927, p. 1309).

Sec. 11. Any person, firm, association or corporation who shall buy and use any motor vehicle fuel for purposes other than in motor vehicles operated, or intended to be operated upon the public highways of the State of California or export the same for use outside of this state; also any person, firm, association or corporation who shall buy any motor vehicle fuel and use the same exclusively in the transportation of rural free delivery mails, and who shall have paid any license tax for such motor vehicle fuel hereby required to be paid, either directly or to the vendor from whom it was purchased, or indirectly by the adding of the amount of such tax to the price of such fuel, shall be reimbursed and repaid the amount of such tax paid by him or it upon presenting to the state controller an affidavit accompanied by the original invoices showing such purchase, which affidavit shall be verified by

the oath of the claimant and shall state the total amount of such fuel so purchased and the same has been used by said consumer for the transportation of rural free delivery mails or for uses other than in motor vehicles operated upon any of the public highways in the State of California. The said state controller, upon the presentation of such affidavits and such invoices or vouchers, shall cause to be paid to such consumer, from the license taxes collected in accordance with the provisions of this act, an amount equal to the license taxes collected hereunder on the motor vehicle fuel so purchased or so used. All such applications shall be filed with the state controller within twelve months from the date of the purchase of such motor vehicle fuel. Any application filed after such twelve months shall not be considered for any purpose by the state controller, the treasurer or the State of California (Cal. Stats. 1923, chap. 267, p. 575, as amended by Cal. Stats. 1925, p. 660 and Cal. Stats. 1927, p. 1309).

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## II.

### DECISIONS AND RULINGS ON THE POST EXCHANGE AS A FEDERAL AGENCY.

**(a) In three cases it has been held that the post exchange is a federal agency.**

In *Dugan v. United States*, 34 Ct. Cl. 458, it was held that a post exchange is a governmental agency under the complete control of the Secretary of War, and that the special tax imposed upon retail liquor dealers was not required to be paid by post exchanges. The court recog-

nized that post exchanges are an integral part of Army organization and an essential factor in military life; that they are not volunteer organizations of individuals, but institutions which fulfill a specific purpose in the military scheme which works for the efficiency of the Army; that building funds for post exchange quarters have been supplied by Congressional appropriation; and that any profits derived from exchange operations are applied to meet needs which Congress, in promoting the welfare of the military personnel, might otherwise be called upon to supply.

The court said:

> "Under Post Exchange Regulations, adopted by the War Department and published by General Orders, No. 46, Headquarters of the Army, July 25, 1895, post exchanges were established and the commanders at every post thereby required to institute the same. . . .
>
> "If, therefore, in the judgment and wisdom of the Executive the establishment of such post exchanges and their management by the officers of the army are essential to the welfare, good order, and discipline of the troops stationed at such army posts, as seems evident from the exchange regulations thus promulgated, then we think such exchanges, though conducted without financial liability to the government, are, in their creation and management, governmental agencies, established for the purpose, as the regulations provide, of supplying 'the troops at reasonable prices with the articles of ordinary use, wear, and consumption not supplied by the government, and to afford them means of rational recreation and amusement', and also, 'through exchange profits, to provide the means for improving the messes.'

> "In other words, the President, looking to the welfare and discipline of the troops, sees that they need some things for ordinary use, wear, and consumption, not supplied by the government, and to meet that condition the War Department adopts and promulgates the regulations whereby post exchanges are established as the medium through which such lack may be supplied."

The Court of Claims similarly held a post exchange a federal agency in *Hyra v. Wood, Administrator*, 71 F. 2d, 19 Ct. Cl. 80, a case involving the loss of post exchange funds:

> "The record presents a troublesome and exceedingly important question to the Military and Naval Establishments of the United States. The contention of the plaintiff is that the amount lost did not belong to the United States, but to the enlisted men, and that even if the funds were lost through the negligence or fault of the officer in charge there is no liability on the part of the officer because the funds did not cover property of the Government . . .
>
> "From what has been said it will be seen that the post exchange is not a voluntary association, but an institution established by the Government for the convenience of the officers and more particularly for the discipline of the enlisted men. The consent of the officers and men for the establishment and maintenance of an exchange is by no means necessary. The regulations settle that. As shown in Dugan's case, supra, the Government acts through its officers under authority of the regulations, and the officer put in charge receives and disburses all the funds, and whatever profit that may accrue is paid to and held by the officer in command of such organization as a company fund. Regulations of the Navy Department, sections 1035 and 1040, inclusive, provide for the

establishment of post exchanges. These regulations conflict with no law.

"A conspiracy to defraud the United States under section 5440 of the Revised Statutes does not necessarily involve a direct pecuniary loss to the United States. But the statute includes any conspiracy to impair, obstruct, or defeat *the lawful function of any department of the Government*.

"Inasmuch as the findings show that the officer was at fault, and did not properly account for the funds which came to his hands, relief under the statute must be denied."

The Supreme Court of the Philippine Islands, in banc, in the case of *Post Exchange, 31st Infantry v. Graves & Kenney* (R. G. No. 30,959, decided August 28, 1929),* held the post exchange to be a federal instrumentality. The exchange had not been registered under the commercial statutes of the Philippine Islands and the defendant demurred. The court held that the exchange was not a commercial association within the statute, but a governmental agency.

"In his second assignment of error the appellant contends that the lower court committed an error in deciding that the plaintiff, the Post Exchange, 31st Infantry, is not a commercial association and is not subject to the commercial laws of the Philippine Islands. We have made a careful examination of the Acts of Congress authorizing the organization of post exchanges at the different stations of the United States Army and the regulations of the War Department in accordance therewith, governing and controlling said post exchanges, and are fully persuaded that they are not commercial organizations. While

*This case has not been officially reported.

> they are in a sense associations of military organizations for business purposes. They are simply governmental agencies or instrumentalities expressly recognized by Congress in the annual appropriation Acts, and are designed to carry out a governmental purpose. Dugan v. U. S., 31 Court of Claims 158. They are simply governmental agencies organized for the purpose of the accommodation of the army and the soldiers and are, in no sense, commercial organizations."

A subsequent decision of the Supreme Court of the Philippine Islands concerning post exchanges will be reviewed later.

**(b) The War Department and the Judge Advocate General have consistently ruled that the post exchange is a federal agency.**

The War Department itself has always insisted that post exchanges are federal agencies and departments of the government. As early as November 21, 1899, the Judge Advocate General ruled upon the question, holding:

> "A post exchange is not legally liable for local or municipal taxes or licenses, on the sale of commodities for the exclusive use of persons in the military service, as such an exchange is an instrumentality of the Government of the United States. C. 7324, Nov. 21, 1899 (Dig. Ops. J. A. G., Rev. Ed. 1904, p. 559, and A. R. 210-65, par. 77f)."

The Judge Advocate General later held (Dig. Ops. of J. A. G., July 1, 1912-April 1, 1917, p. 459) that as a government agency the post exchange was not required to pay a dealer's tax upon the sale of tobacco:

> "By the act of October 22, 1914, commonly known as the War Revenue Act, it was provided that—'deal-

ers in tobacco . . . whose annual receipts from the sale of tobacco exceed $900 shall each pay $4.80 for each store, shop, or other place in which tobacco, in any form, is sold.' Held, that post exchanges, being Government agencies, are not required to pay the tax (*Duncan v. U. S.*, 31 Ct. Cls. 158) (40 100 J. A. G. Dec. 30, 1914)."

The Judge Advocate General for the same reason held that post exchanges displaying motion pictures and billiard tables and bowling alleys at post exchanges are not subject to the payment of internal revenue tax (Ops. J. A. G., 40 100, Jan. 30, 1915); and that post exchanges are not liable for income tax under 40 Stat. 300, 333 (Dig. Ops. J. A. G., April, 1918, p. 26).

The Judge Advocate General similarly held (Ops. J. A. G., Vol. II, 1918, p. 371 May 17, 1918) that no tax should be collected for admission to places of amusement operated by post exchanges, stating:

> "Post exchanges are conducted solely for the benefit of enlisted men under the supervision of the Government. No part of the proceeds derived from admission fees at places of amusement conducted by post exchanges is payable to any individual, but the entire amount thus collected is used for the benefit of enlisted men in the military service. The Commissioner of Internal Revenue, construing the War Revenue Act of October 3, 1917 (40 Stat. 300, 318), has issued instructions that no tax should be collected for admissions to places of amusement operated by or under the supervision of the Government where no part of the proceeds is payable to individuals, but all such proceeds are exclusively for the benefit of persons in the military service. Consequently, the admission fees at places of amusement conducted by

such post exchanges, are not subject to the war tax on admission provided for by section 700 of said act."

The Judge Advocate General has likewise held that "an automobile operated by a post exchange for the benefit of its members and their families" is not subject to taxation under 40 Stat. 1057, 1128 (Dig. Ops. J. A. G., 1919, p. 465); that "a post exchange purchasing . . . merchandise for sale to the military and civilian personnel at the post is a Government facility, not a dealer . . . and is not required to collect a war tax on such sales" (Dig. Ops. J. A. G., 1924, p. 17); and that "Soft drinks sold at an officers' club are exempt" from the tax imposed by 40 Stat. 1057, sec. 630 (Digs. Ops. J. A. G., 1919, pp. 181, 320).

The War Department has similarly held that post exchanges are not subject to state taxation, stating (Dig. Ops. J. A. G., 1929, p. 11):

> "The post exchange system was inaugurated, established, and is being maintained with Congressional sanction to discharge Governmental obligations in the lawful exercise of constitutional powers, and is a Governmental agency. Being the means employed for the performance of Federal functions, purchases by it can not be legally subjected to state taxation. Further, state statutes do not have application to it when it is located upon lands acquired by the Federal Government in accordance with the provision of the Federal constitution, because such lands have ceased to be a part of the state and have become Federal territory over which the Federal Government has complete and exclusive jurisdiction and power of legislation. Such lands being beyond and without the state, both in a jurisdictional and legal sense (though geographically

within the borders of the state), commerce moving thereto or therefrom, from or to a state or territory, constitutes interstate commerce, and as such cannot be subjected to other than Federal taxation or regulation."

**(c) The Navy Department's ruling follows that of the Army.**

The Secretary of the Navy has ruled that the California motor vehicle fuel tax is not applicable to gasoline bought by the Navy and resold through commissary stores. His opinion follows:

"Department of the Navy
Washington, D. C.

File: JJT 6/LH 3(16) (280508)
CA:LM Feb. 28, 1929

J. A. McNair, Esq.,
Associate General Counsel, The Texas Company
929 South Broadway
Los Angeles, California
Sir:

There has been brought to my attention your letter of January 31, 1929, addressed to the Bureau of Supplies and Accounts, with respect to the application of the California State Tax to gasoline purchased by the Navy and resold through commissary stores.

Congress has authorized the Navy to sell gasoline to its personnel by an act approved March 3, 1909 (35 Stat. 768; 34 U. S. Code, sec. 533), which provides that

'Such stores as the Secretary of the Navy may designate may be procured and sold to officers and enlisted men of the Navy and Marine Corps, also to civilian employees at naval stations beyond the continental limits of the United States and in

> Alaska, under such regulations as the Secretary of the Navy may prescribe.'
>
> Commissary stores of the Navy, which exist by virtue of this statutory authority and in necessary execution thereof, are clearly instrumentalities of the United States, created by Congress in the exercise of its constitutional power 'to make rules for the government and regulation of the land and naval forces.' As stated by the Supreme Court in the Panhandle Oil Company case, *supra*, 'the States may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions.'
>
> In view of the foregoing I am convinced that the States cannot exact payment of taxes on gasoline sold to the Navy, irrespective of the use made of said gasoline after title thereto has passed to the United States. The inclusion in future bids of the provision suggested in your letter, which would distinguish between gasoline purchased 'for the official use of the U. S. Government', and that purchased 'for the purpose of commissary distribution', cannot, therefore, receive my approval . . .
>
> Very respectfully,
>
> (Signed) Curtis D. Wilbur."

In *War Department, J. A. G. O., July 19, 1929*, it was held that gasoline sold to the Post Exchange, Presidio of Monterey, was not subject to the California gasoline tax, as set forth in the following communication from the Judge Advocate General to the Office of the Commanding General at the Presidio of San Francisco:

"Headquarters Ninth Corps Area
Office of the Commanding General
Presidio of San Francisco

331.3 (AG M)

August 1, 1929.

Subject: State Gasoline Tax on Post Exchange Sales Gasoline.

To: Commanding Officers, all Posts, Camps and Stations within the territorial limits of the Ninth Corps Area.

For their information and guidance the following is a War Department decision in connection with taxation by states of Gasoline sold to Post Exchanges:

"Civil Affairs No. 2

JAG 463.7 5th Ind.

"War Department, J. A. G. O. July 19, 1929. To the Adjutant General.

"2. The question involved in this case is whether gasoline sold to a post exchange is subject to the tax of three cents per gallon imposed under Act 2964 of the State of California as amended by acts appearing in Statutes of California 1925, p. 659 and 1927, p. 1308. Section 10 of the act provides that it shall not apply to any motor vehicle fuel sold to the Government of the United States or to any department thereof for the official use of the government.

"3. A similar question was before the War Department on the occasion of correspondence with the legal department of the Texas Company of Los Angeles, California. Under date of May 8, 1929, the Secretary of War stated:

'It is the unalterable view of the War Department that in making sales of gasoline to the an-

thorized purchasers, a post exchange is carrying out the policy of the Government, is engaged in Governmental business, and that sales of gasoline made to a post exchange are not subject to a State gasoline excise law because of the principle enunciated in the case of Panhandle Oil Co. v. Mississippi, 277 U. S. 218. I also incline to the view that where the post exchange is located on a federal reservation, it is not within the jurisdiction of any state, and gasoline shipped by state dealers to such post exchanges on the reservation would be subject to the constitutional protection accorded property moving in interstate commerce.'

"4. The above quoted ruling of the Secretary of War disposes of the present question."

**(d) Analysis of two cases which challenge the character of the post exchange as a federal instrumentality.**

Two cases have been found holding that the post exchange is not a federal agency. The first of these is *Keane v. U. S.*, 272 Fed. 577. It does not involve the constitutional limitations upon the power of the state to tax and we believe that it in no way affects the present issue. The only question presented in the *Keane* case was the construction of a penal statute. The court was not required to determine whether a post exchange is an official department of the government. "The question" said the court, "we must decide is whether or not a post exchange is *such a lawful department of the government as to bring it within the protection of section 37 of the Criminal Code*," and it was held that although departments might be created and regulations might be lawfully prescribed by executive order, these regulations could not bring individuals who violated them within the terms of a penal

statute unless Congress expressly so provided. Section 37 of the Criminal Code reads as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The court held that it could not be extended to include conspiracy to defraud on the part of a post exchange officer for the reason that "a violation of the departmental regulations is not a criminal offense unless the Congress distinctly makes it so", and to hold otherwise would be tantamount to giving the Secretary of War "the authority to enact a criminal statute".

It is noteworthy that the conclusion of the majority of the court was based upon two erroneous premises. The opinion cites an act of Congress of July 16, 1892 (27 Stat. 178) declaring that "hereafter no money appropriated for the support of the army shall be expended for post gardens or exchanges," and adds that this is the only reference to a post exchange that the court has "been able to find in the mass of statutes passed by Congress from its first session down to the present".

The numerous acts of Congress to which we have referred in which appropriations for post exchanges have been made in express terms, seem to have escaped the court's attention. Indeed, the court was under the misapprehension that post exchanges do not enjoy federal appropriation. The court said (p. 587):

> "We think that this highly penal statute cannot apply to any lawful department, so as that a fraud upon the United States can arise from or be involved in any transaction concerning it, unless such lawful department is created by Congress or directly authorized by it, and in addition thereto it must be 'such a lawful department' as that Congress appropriates the public moneys to maintain and operate. Clearly the post exchange described in the indictment in this case is not such a lawful department of government."

The majority of the court in the *Keane* case also appear to have assumed that the War Department has recognized the so called "purely private" character of post exchanges, stating (pp. 581-2):

> "In this connection it may be mentioned that these post exchanges are such purely private organizations for the convenience and pleasure of the soldiers themselves that they have been required to pay floor taxes on tobacco under section 702 of the Revenue Act of February 24, 1919 (Comp. St. Ann. Supp. 1919, Sec. 6204d). The Judge Advocate General's Office, a branch of the War Department, held that these exchanges were subject to floor taxes on tobacco. See Opinions of the Judge Advocate General, 3313, February 28, 1919."

This is the only ruling of the Judge Advocate General which the court cites. We have seen that it was reversed by the *Panhandle* case. We have also seen that the Judge Advocate General has uniformly held that post exchanges are official departments of the government. In view of this situation, it is patent that the court was improperly advised in its assumption that the War Department regarded post exchanges as private in character.

The second case at variance with our contentions concerning the status of the post exchange is *Thirty-first Infantry Post Exchange v. Posadas*, 54 Phil. 866. Plaintiff sought an injunction to restrain the Collector of Internal Revenue in the Philippine Islands from collecting a tax levied by the insular government on sales made to the post exchange. The court considered the *Panhandle Oil Company* case but distinguished the situation presented in the case before it on three major grounds. It argued that (1) while the plaintiff in error in the *Panhandle Oil Company* case was an oil company which had been sued by the state to recover taxes, the plaintiffs in the Philippine case were not the persons who had paid the tax; (2) in the *Panhandle Oil Company* case the law in question was the act of a state legislature, but in the Philippine case the laws in question were acts of the Philippine legislature which had been ratified by Congress after passage and raised to the level of organic laws; and (3) in the *Panhandle Oil Company* case the sales had been made to the Coast Guard Fleet and a Veterans' Hospital which were instrumentalities authorized by the constitution, but in the Philippine case the sales were made to a post exchange not so authorized.

Certiorari was denied by this court (283 U. S. 839). In the petition for the writ six questions were presented, including (a) the right of the purchaser rather than the seller to maintain the action, and (b) the effect of congressional ratification upon the Philippine statute. The refusal of this court to review the case may well have been based upon its concurrence in the views of the insular court on either of these two points. The question of the status of the post exchange as a federal instru-

mentality was but one of the six questions presented. It is earnestly submitted that in this regard the Philippine court was in error and that the affirmative case which is made in the long line of authorities and opinions which we have cited supports and requires the exemption of post exchanges from the levy of the California tax. The questions of the proper party to the action and congressional consent to the imposition of the tax are not present in our case. We are returned, therefore, to the situation presented in the *Panhandle Oil Company* case if the post exchange as a federal instrumentality on a plane similar to that of a Veterans' Hospital or a Coast Guard Fleet.